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No. 95-480

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

FIDELITY AND CASUALTY COMPANY OF NEW YORK, THE HANOVER INSURANCE COMPANY, and THE TRAVELERS INSURANCE COMPANY,

Petitioners,

versus

SIDNEY N. AHYSEN, ET AL,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Louisiana

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

LISKOW & LEWIS
S. GENE FENDLER*
MARY S. JOHNSON
LISKOW & LEWIS
50th Floor, One Shell Square
New Orleans, LA 70139-5001
Telephone: (504) 581-7979

Fidelity and Casualty Insurance Company of New York, The Hanover Insurance Company, and The Travelers Insurance Company

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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ARGUMENT

1. The Federal Issue is Squarely Framed for Determination.

Respondents assert that these cases are not "ripe" while at the same time admitting the facts necessary to determine the federal questions presented. Respondents' opposition does not challenge that they are ship repair workers of a covered employer, or that they were exposed to asbestos while engaged in ship repair work at Todd.

Indeed, the briefing in the state district court established that "there is no dispute that the plaintiffs were engaged in ship repair work and were 'employees' within the meaning of the LHWCA. Nor is there any dispute that Todd Shipyards properly secured compensation under the LHWCA that would cover eligible employees." Todd's Mem. in Support of Motion for Summary Judgment, 2/21/95, p. 5. Respondents have never challenged these statements. Respondents conceded coverage and openly admitted that "[i]n 1972 the LHWCA was amended to reach landward and *cover shipyard workers like the plaintiffs*." Pl. Mem. in Opp. to Summary Judgment, 3/3/95, p. 3.[1] There simply are no other facts necessary to determine the federal issues presented.

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[1] Moreover, since Petitioners filed the Motion for Summary Judgment, all of the plaintiffs scheduled for trial in January, 1996, have been deposed and all but one alleged that they were exposed to asbestos while engaged in ship repair work on ships at Todd's New Orleans ship repair facility. The one plaintiff who did not work on ships worked in the store room on the wharf supplying materials to the ship repair workers.

The only factual issue suggested by Respondents is "when the individual plaintiff's onset of disability began." Response to Petition, p. 1, n.1. This assertion is based on the intermediate state appellate court's statement that there were factual issues involved "because respondents/plaintiffs allege that their illness and/or disabilities were contracted by them during the 1970s and 1980s." Petition for Writ, App. C. But whether the illnesses or disabilities were contracted by the plaintiffs in the 1970s or 1980s is completely irrelevant for purposes of determining LHWCA exclusivity.

The LHWCA's provision extending tort immunity to co-employees was enacted in 1959, and it applies to this action regardless of whether the illness was "contracted" in the 1970s or 1980s. 33 U.S.C. § 933(i); Pub.L. 86-171 (1959). Coverage under the LHWCA is triggered on the date the plaintiff becomes aware that his illness is or may be job-related. 33 U.S.C. § 912(a). Thus, as a matter of federal law, it does not matter when the plaintiff was exposed or when the illness was contracted; the only relevant fact is the date the plaintiffs became aware that the illness may be related to their employment. In these cases, the plaintiffs admit that they all were first diagnosed some time after 1991. Petition for Writ, App. A. The applicability of Section 933(i) is triggered at that time, and further factual development on the dates of exposure or contraction will not affect the exclusivity analysis.

2. Louisiana Will Continue To Ignore Section 933(i).

Respondents contend that the state workers' compensation law allowing suits against co-employees was

amended in 1976 and 1990 to eliminate co-employee liability and concurrent jurisdiction, and conclude that "the question is moot and does not warrant U.S. Supreme Court review." Response to Petition, p. 5. But Respondents ignore that these cases began after both of these state law amendments were in effect. Notwithstanding these amendments, the Louisiana Supreme Court is giving plaintiffs a cause of action against co-employees by applying legislative rules which have been abolished since 1976. *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992). Under the *Cole* decision, there are currently *thousands* of asbestos exposure cases pending against shipyard co-employees in Louisiana.

In addition, the Louisiana Supreme Court stands alone in consistently ignoring LHWCA tort immunity since it adopted the outdated "election of remedies" doctrine in *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), *appeal dismissed*, 434 U.S. 803 (1977). This action began after the 1990 amendment to the Louisiana Workers' Compensation Law overruling *Poche* and abolishing concurrent jurisdiction in Louisiana. La. Rev. Stat. Ann. 23:1035.2. Yet the Louisiana Supreme Court refused to dismiss this action in spite of LHWCA immunity, apparently because the *Cole* decision allowed the Court to apply pre-1990 law. Thus, co-employees will continue to be sued for tort damages and Louisiana's twenty-year history of ignoring LHWCA immunity will continue unless this Court grants this writ. Under these circumstances, one could hardly argue that the issue is "moot."

3. Respondents' Reliance on State Law Authorities Misses the Point.

Having conceded LHWCA coverage, Respondents rely solely on the concurrent jurisdiction doctrine to justify their suits against the Todd co-employees. As this Court recognized in *Sun Ship v. Pennsylvania*, 447 U.S. 715 (1980), concurrent jurisdiction exists for purposes of maximizing workers' compensation benefits. But this Court has never held that concurrent jurisdiction allowed a tort suit otherwise expressly prohibited by Section 933(i). Indeed, this Court recognized in *Sun Ship* that preemption may occur when, as in this case, a state law stands in direct conflict with some specific provision of the LHWCA. *Id.* at 724 n.6. *See also, Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991) (holding that Section 933(i) preempted state tort claims).

Respondents cite numerous state authorities, none of which has any bearing on the federal question to be answered. It simply does not matter whether Louisiana's case law applies concurrent jurisdiction to tort cases. The question is whether federal law *allows* the state to apply concurrent jurisdiction in tort cases, as opposed to benefits cases. Petitioners have presented this Court with numerous state and federal authorities which, like the *Peter* court, hold that concurrent jurisdiction in tort cases is in direct conflict with Section 933(i) and must be rejected.

Respondents argue that the plaintiffs' tort-based causes of action are "vested" under state law and therefore may not be preempted under Section 933(i). According to Respondents, state law tort remedies become "vested" on the date a plaintiff first inhales the asbestos fibers. Response to Petition, p. 6. In other words, the Respondents argue that Section 933(i) may not be applied because Louisiana follows the "exposure theory" in occupational disease cases.

Respondents' reliance on the exposure theory adopted by the Louisiana Supreme Court stands in direct contrast to the Supremacy Clause of the United States Constitution. No State may ignore a federal statute simply because it conflicts with a state law rule. If LHWCA tort immunity depended on the interpretation of state law as to when tort remedies become "vested," then Section 933(i) will mean different things in different states. For example, an occupational disease suit in Alabama is preempted by Section 933(i) under *Fillinger v. Foster*, 448 So.2d 321 (Ala.), *cert. denied*, 469 U.S. 872 (1984), while an identical suit in Louisiana will not be preempted. Moreover, the same suit in federal court will be preempted without regard to state law, but preemption in Louisiana *will depend* on state law.

When a state law and a federal law directly conflict, as in this case, the Supremacy Clause requires that the state law be preempted. For this reason, Louisiana's adoption of the exposure theory of liability is irrelevant for purposes of interpreting the scope of LHWCA Section 933(i).

CONCLUSION

For nearly twenty years, Louisiana has annulled federal co-employee immunity mandated by the LHWCA. The federal issue presented in this Petition is squarely framed for determination. The issue to be decided is purely legal – can a state ignore the express exclusivity provision of LHWCA Section 933(i) in a tort suit against a co-employee? Until this Court answers that question, co-employees in Louisiana will continue to be deprived of the "quid pro quo" envisioned by Congress when it enacted Section 933(i).

Respectfully submitted,

S. GENE FENDLER
MARY S. JOHNSON
LISKOW & LEWIS
50th Floor, One Shell Square
New Orleans, LA 70139-5001
Telephone: (504) 581-7979

Fidelity and Casualty Insurance Company of New York, The Hanover Insurance Company, and The Travelers Insurance Company